

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
KEY WEST DIVISION**

CASE NO.: 07-10024-CIV-MOORE

THOMAS GRAY,)
)
 Plaintiff,)
)
 vs.)
)
 MARK E. KOHL, in his official capacity)
 as State Attorney for the Sixteenth Judicial)
 Circuit of Florida, RICHARD D. ROTH)
 in his official capacity as Monroe County)
 Sheriff, and SHERIFF'S OFFICER JOHN)
 PEREZ, in his official capacity,)
)
 Defendants.)
 _____)

**MEMORANDUM IN SUPPORT OF PLAINTIFF'S
MOTION FOR PRELIMINARY INJUNCTION**

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MEMORANDUM OF LAW

I. INTRODUCTION

Would it ever have been thought that there would come a time in America that a law would be utilized to arrest, fine and jail a Gideon for merely handing out Bibles on a public sidewalk? The State of Florida is utilizing its School Safety Zone Statute to do just that. Defendants have prohibited Plaintiff from peacefully handing out Bibles on a public sidewalk within 500 feet of any school in the entire State. In a country founded on religious freedom, the actions of the State are incredible. Does the State believe that its citizens will be safer if “protected” from Bibles? The State is engaging in desperate measures to prohibit Plaintiff from exercising his constitutional rights.

In a nutshell, F.S.A. §810.0975 (attached as Ex. 26) prohibits any person from entering within 500 feet of any school property without “legitimate business,” which is not defined, or without prior authorization, but not specifying from whom it should be sought. The amount of constitutional infirmities present in the Statute is quite remarkable:

- 1) It is an unconstitutional prior restraint in that it prohibits speech in advance without the required guidelines to limit the unbridled discretion of those enforcing it;
- 2) It is unconstitutionally vague in that it does not define legitimate business, nor does it specify who has the “power” to decide what speech is authorized beforehand;
- 3) It is unconstitutionally overbroad because it prohibits a substantial amount of speech (in fact, the way it is construed by Defendants, it prohibits all speech without prior authorization);
- 4) It is unconstitutional because it is not narrowly tailored, nor does it employ the least restrictive means as it is both underinclusive and overinclusive; and
- 5) It is unconstitutionally content-based because it exempts protest from its reach but applies to all other speech, and because its enforcement is based on complaints of those objecting.

As a matter of law, engaging in protected speech activities in a traditional public forum constitutes “legitimate business” pursuant to the First Amendment, and is “authorized” by the Constitution. As a matter of fact, the daily use of the public sidewalk in question by anyone for any reason (except apparently distributing Bibles) clearly proves that Plaintiff was engaging in “legitimate business” “authorized” by law.

II. STATEMENT OF FACTS¹

III. THE STATUTE VIOLATES A SLEW OF CONSTITUTIONAL GUARANTEES.

The Statute, both on its face and as-applied to Plaintiff's peaceful, non-disruptive distribution of Bibles on a public right of way, is an egregious violation of the Constitutional rights of Free Speech and Due Process.

A. THE STATUTE VIOLATES THE PLAINTIFF'S RIGHT TO FREEDOM OF SPEECH.

At the outset, it is important to note that at least one federal court has already addressed the exact question of whether the Gideons may be prohibited from distributing Bibles from a sidewalk adjacent to a public school, and answered that question with a resounding "No."

In *Bacon v. Bradley-Bourbonnais High School Dist. No. 307*, 707 F. Supp. 1005 (C.D. Ill. 1989), a public school prohibited a Gideon from distributing Bibles from a public sidewalk adjacent to the school. The federal district court held that the sidewalk at issue (even though owned by the school and located on school property) was a traditional public forum. *Id.* at 1008. The School in *Bacon* proffered the same interests as the State does here to justify their prohibition on Gideon Bible distributions: protecting students from gang members and drug dealers. *Id.* at 1009 (superintendent had seen gang members contacting students as they left the school). The Court rejected this justification, and issued an injunction enjoining the School from "preventing or forbidding the plaintiff's distribution of printed materials, specifically but not limited to Gideon Bibles, to persons passing on the sidewalk in front of the high school." *Id.* at 1010.

Bacon shows that this is not a difficult case. The First Amendment Free Speech Clause protects the right of people to distribute free Bibles to public school students and their parents on sidewalks adjacent to those schools.

1. Distributing religious literature is protected speech.

There can be no doubt that Mr. Gray's communication of his religious beliefs, by peacefully distributing Bibles in a public forum, merits the highest First Amendment protections. Literature distribution of this type has been recognized as a fundamental freedom since the birth of our nation. The Supreme Court noted the historical pedigree of literature distribution in *Lovell v. City of Griffin*,

¹ Rather than merely repeat every fact listed in the Verified Complaint, Plaintiff hereby incorporates by reference those facts.

303 U.S. 444 (1938). *Lovell* involved an ordinance which required anyone wishing to distribute “literature of any kind” to first obtain written permission from the City Manager. A Jehovah’s Witness had been charged under the ordinance after she attempted to distribute religious literature without a permit. The Supreme Court struck down the ordinance as facially unconstitutional, holding that its broad sweep subjected Free Speech and Freedom of the Press rights to the very type of censorship which the First Amendment was designed to prevent. In so holding, the Court noted the vital historical role of such literature:

The liberty of the press is not confined to newspapers and periodicals. It necessarily embraces pamphlets and leaflets. These indeed have been historic weapons in the defense of liberty, as the pamphlets of Thomas Paine and others in our own history abundantly attest. The press in its historic connotation comprehends every sort of publication which affords a vehicle of information and opinion.

303 U.S. at 452. This case confronts the same basic freedoms that were at stake in *Lovell*.

The fact that Plaintiff’s literature was religious, and his distribution was compelled by his religious beliefs, adds another important dimension. The Supreme Court has extolled the virtue of religious literature distribution and has frequently described the breadth of protection extended to such expressive activities:

The hand distribution of religious tracts is an age-old form of missionary evangelism--as old as the history of printing presses. It has been a potent force in various religious movements down through the years This form of religious activity occupies the same high estate under the First Amendment as do worship in the churches and preaching from the pulpits. It has the same claim to protection as the more orthodox and conventional exercises of religion. It also has the same claim as the others to the guarantees of freedom of speech and freedom of the press.

Murdock v. Pennsylvania, 319 U.S. 105, 108-09 (1943)(footnotes omitted). *Murdock* involved Jehovah’s Witnesses who were arrested for selling their religious pamphlets without purchasing a license from the City, as a City ordinance required. The Supreme Court struck down the license ordinance, deeming the distribution of religious literature to be a basic aspect of freedom of speech and of the press. The Court further held that government “may not impose a charge for the enjoyment of a right granted by the Federal Constitution.” *Id.* at 113.

Mr. Gray’s Bible distribution is nearly identical to the activities in *Murdock*, except that his distribution was purer speech in that he gave away the Bibles at no charge and solicited no monies of any kind. Yet, the State has threatened even greater harm to Mr. Gray’s exercise of his First Amendment freedoms than the license fee at issue in *Murdock*. Whereas the license cost, at its

highest rate, was \$1.50 per day, §810.0975(2)(b) states that a person found guilty of a misdemeanor of the second degree subjects Mr. Gray to up to 60 days in jail, F.S.A. §775.082, or up to a \$500 fine, F.S.A. §775.083, or both. The impact of such a fine and/or imprisonment on Mr. Gray would be devastating. The pressure on the Plaintiff not to exercise his First Amendment freedoms far exceeds the pressure repudiated by the Supreme Court in *Murdock*.

Both *Murdock* and *Lovell* show that, not only is Mr. Gray's right to distribute religious literature held in the highest esteem under the First Amendment, but the State's attempt to make him pay for the exercise of that right via a fine or imprisonment is clearly unconstitutional.

2. The public bike path/sidewalk at issue here is a traditional public forum.

Another reason Mr. Gray's activities merit the highest form of First Amendment protection is that they occurred in a traditional public forum. The Supreme Court has consistently recognized three types of speech fora: traditional public fora (e.g., streets and sidewalks, *United States v. Grace*, 461 U.S. 171, 177 (1983)); public fora created by government designation (e.g., public university meeting rooms, *Widmar v. Vincent*, 454 U.S. 263, 267 (1981)); nonpublic fora (e.g., jails, *Adderley v. Florida*, 385 U.S. 39, 41 (1966)).

Under *Grace*, the public sidewalk where Mr. Gray was distributing literature is clearly a public forum for his First Amendment activities. In *Grace*, the Supreme Court overturned the convictions of two peaceful protesters, one of whom was holding a sign and the other of whom was distributing leaflets, on the sidewalks surrounding the Supreme Court building. In overturning the convictions, the Court held, "'Public places' historically associated with the free exercise of expressive activities, such as streets, sidewalks, and parks, are considered, without more, to be 'public forums.'" *Id.* at 177 (citation omitted). In so holding, the Court noted a long line of cases deeming streets, parks, and sidewalks to be public forums, including *Hague v. CIO*, 307 U.S. 496, 515 (1939), which memorably stated:

Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions. Such use of the streets and public places has, from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens.

Because the sidewalks surrounding the Supreme Court were "indistinguishable from any other sidewalks" the *Grace* Court held that they must be treated as public fora. 461 U.S. at 182.

Likewise, the public bike path/sidewalk at issue in this case is just like any other public sidewalk which has traditionally served as a venue for expressive activities. The public bike path/sidewalk where Mr. Gray was distributing Bibles is open and accessible to the public and is frequently used by members of the public for walking, biking, jogging, and other activities. Comp. ¶¶37-40. Like the sidewalk at issue in *Grace*, “There is no separation, no fence, and no indication whatever to persons stepping from the street to the curb and sidewalks that serve as the perimeter of the Court grounds that they have entered some special type of enclave.” *Id.* at 180. *Grace* controls here, and proves that the sidewalk where Mr. Gray was standing is a traditional public forum.

The Supreme Court has also held that the fact that a sidewalk is located adjacent to a public school, like the public bike path/sidewalk involved here, does not change its status as a traditional public forum. *Grayned v. City of Rockford*, 408 U.S. 104, 118 (1972). As the Court in *Grayned* bluntly put it, “[W]e think it clear that the public sidewalk adjacent to school grounds may not be declared off limits for expressive activity by members of the public.” *Id.* Following *Grayned*, the federal court in *Bacon*, 707 F. Supp. at 1008, held that “it is nonsense to say that the sidewalk in front of the high school, considering its unrestricted use by pedestrians, is not a public way and therefore not a public forum.” This was so in *Bacon* even though the sidewalk was owned by the School and was located on the school’s property. Here, the public bike path/sidewalk where the Plaintiff handed out Bibles is owned and maintained by Monroe County (not the School), is not located on School property, and runs adjacent to the School’s property and a public street. Obviously, the public bike path/sidewalk at issue here is a traditional public forum.

3. The Statute is an unconstitutional prior restraint.

Prior restraints are government regulations that give “public officials the power to deny use of a forum in advance of actual expression.” *Ward v. Rock Against Racism*, 491 U.S. 791, 795 n.5 (1989). Prior restraints carry a “heavy presumption against [their] constitutional validity.” *New York Times Co. v. United States*, 403 U.S. 713, 714 (1971) (per curiam). “It is clearly unconstitutional to enable a public official to determine which expressions of view will be permitted . . . by use of a statute providing a system of broad discretionary licensing power, or . . . the equivalent of such a system by selective enforcement of an extremely broad prohibitory statute.” *Cox v. Louisiana*, 379 U.S. 536, 557 (1965). F.S.A. §810.0975 is just such a prohibitory statute.

F.S.A. §810.0975 operates as a prior restraint because it requires all speakers to obtain

permission before they can engage in desired expression, and because it grants government officials unfettered discretion to selectively enforce it. The Statute requires speakers to obtain permission before engaging in First Amendment activities through prior “authorization, license, or invitation.” F.S.A. §810.0975(2)(a)&(b). The Statute places unfettered discretion in those charged with enforcing it by allowing them to determine what constitutes “legitimate business.” *Id.*

Federal and state courts have routinely held that laws allowing enforcement officials to determine what constitutes “legitimate business,” a “lawful purpose,” or the like, permit those officials to wield unfettered discretion. For instance, in *City of Chicago v. Morales*, 527 U.S. 41 (1999), the Supreme Court struck down an anti-loitering ordinance which allowed police officers to order the dispersal of any persons they “reasonably believed” to be members of criminal street gangs, who were loitering with other persons “with no apparent purpose.” *Id.* at 47 (emphasis added). The ordinance struck down in *Morales* served a similar purpose to the Statute here: to protect people from gang members. Nevertheless, the Court held the ordinance to be unconstitutionally vague because the term “apparent purpose” was so standardless that it provided absolute discretion to police officers to determine what activities constituted loitering. *Id.* at 56-57; *see id.* at 56 (“It is difficult to imagine how any citizen of the city of Chicago standing in a public place with a group of people would know if he or she had an ‘apparent purpose’”).

Similarly, in *Papachristou v. City of Jacksonville*, 405 U.S. 156 (1972), a vagrancy ordinance was at issue which criminalized idle persons, including those “wandering or strolling around from place to place without any lawful purpose or object.” *Id.* at 158 (emphasis added). Some of the defendants in *Papachristou* were arrested simply for driving late at night near a used-car lot which had been burglarized several times. Two other defendants were charged after waiting for a friend to give them a ride. The Court held that the ordinance was unconstitutional because its prohibition was so ill-defined that it “encourage[d] arbitrary and erratic arrests and convictions.” *Id.* at 162. *See also Kirkwood v. Loeb*, 323 F. Supp. 611 (W.D. Tenn. 1971) (“Legislation embodying such terms as ‘without any legitimate business or purpose,’ . . . fall short of adequately establishing criteria which can be interpreted consistently and uniformly); *K.L.J. v. State*, 581 So. 2d 920, 922 (Fla. 1st DCA 1991) (Ordinance stricken because the term “legitimate business” could “be applied in a manner which would infringe on the basis [sic] rights guaranteed by the United States and Florida Constitutions”). The danger posed to First Amendment freedoms by criminal laws that require

persons to have “legitimate business” has been established for decades.

The unfettered discretion that state officials and police officers wielded pursuant to §810.0975 to restrict Plaintiff’s speech is indistinguishable from the unfettered discretion the Supreme Court found unconstitutional in *Shuttlesworth v. City of Birmingham*, 394 U.S. 147 (1969). In *Shuttlesworth*, a black minister had led a peaceful civil rights march through Birmingham. Like Mr. Gray’s careful adherence to the law, the Court noted that the marchers “stayed on the sidewalks except at street intersections, and they did not interfere with other pedestrians. No automobiles were obstructed, nor were traffic signals disobeyed.” *Id.* at 149. One of the organizers of the march was convicted under a city ordinance for not having a permit, which was required for “any parade or procession or other public demonstration on the streets or other public ways of the city.” *Id.*

In overturning the conviction, the Court noted that the authorities in charge of issuing permits “were to be guided only by their own ideas of ‘public welfare, peace, safety, health, decency, good order, morals, or convenience.’” *Id.* at 150. The Court held that such a scheme, which made the peaceful enjoyment of constitutional freedoms contingent on “the uncontrolled will of an official,” was clearly unconstitutional. *Id.* at 151. The same vice is present here. There are no guidelines to control the decision makers. As stated in *Bischoff v. State of Fla.*, 242 F.Supp.2d 1226, 1258 (M.D. Fla. 2003), “a prior restraint exists because the governments of Florida and of each county can deny access to a forum for expression, the borders of Florida’s roads, before the expression occurs. The permitting scheme established by [the statute] lacks the procedural safeguards necessary to ensure against undue suppression of protected speech.”

Indeed, the unfettered discretion §810.0975 grants enforcement officials is highlighted by the facts of this case. First, the Plaintiff distributed Bibles on the same sidewalk a few weeks earlier with Officers present and had no problems. Comp. ¶¶65-67. Plaintiff also received permission to conduct his Bible distribution from the Monroe County Sheriff’s Office prior to January 19, 2007. Comp. ¶¶71. On the day of his distribution, a School official approved of his Bible distribution. *Id.* at 80. In addition, a Florida State Police Officer who stopped by the Plaintiff position on the day of the distribution did not find his activities problematic. *Id.* at ¶82. Nonetheless, he was prohibited by Defendants from distributing Bibles (and other Gideons were arrested) pursuant to §810.0975.²

² The Statute grants unfettered discretion in many ways: it does not specify which government official makes the decision whether speech is “legitimate” or whether to grant

B. THE STATUTE VIOLATES THE RIGHT TO DUE PROCESS.

Related to the vice of unbridled discretion, the vagueness doctrine is based on due process principles of fair notice and warning. It requires that a governmental restriction be sufficiently specific to avoid arbitrary and discriminatory enforcement by government officials. *Connally v. General Constr. Co.*, 269 U.S. 385, 391 (1926). A restriction is vague if “men of common intelligence must guess at its meaning and differ as to its application.” *Id.* See also *Bischoff*, 242 F.Supp.2d at 1256 (The statute “does not sufficiently define the conduct that it proscribes when measured by common understanding and practices. As is evident from the above facial analysis, persons of common intelligence (including Osceola County Sheriff’s Deputies and the Attorney General of the State of Florida) must necessarily guess at its meaning and differ as to its application”). The same is true here when, under the exact same set of facts, the first Bible distribution was permitted with Deputies present, while the second was not. Comp. ¶¶59-67; 69-99.

The Supreme Court has established two bases for vagueness challenges to criminal laws:

Vagueness may invalidate a criminal law for either of two independent reasons. First, it may fail to provide the kind of notice that will enable ordinary people to understand what conduct it prohibits; second, it may authorize and even encourage arbitrary and discriminatory enforcement.

Morales, 527 U.S. at 56 (opinion of Stevens, J.). Section 810.0975 is vague on both grounds.

The Supreme Court in *Grayned*, 408 U.S. at 108-09, explained the dangers in this manner:

Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give a person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. . . . [W]here a vague statute abuts upon sensitive areas of basic First Amendment freedoms, it operates to inhibit the exercise of those freedoms.

1. The Statute fails to provide the required notice to the Plaintiff.

Failure of a law to provide reasonable notice of what conduct is prohibited is the first evidence that the law is vague. Laws requiring persons to have “legitimate business” or “lawful purposes,” like the law at issue in this case, are routinely stricken by courts as unconstitutionally

permission regardless; it does not state how long in advance permission must be sought; it does not state how long permission lasts if granted; it does not specify a time frame in which the unknown official must decide; it does not provide for any procedure for prompt review; and it does not include any guidelines or criteria for the unknown official to abide by.

vague. In *Papachristou*, 405 U.S. at 162, the Supreme Court held that “[a] regulation is impermissibly vague if, by its terms, it fails to provide adequate notice of its scope, and sufficient guidance for its application.” There, the vagrancy ordinance at issue criminalized idle wandering “without any lawful purpose or object.” *Id.* at 156. The Court held that the ordinance was “void for vagueness” because it failed to provide adequate notice of what conduct it prohibited. *Id.* at 162.

Similarly, in *Ricks v. District of Columbia*, 414 F.2d 1097, 1100 (D.C. Cir. 1968), the Court of Appeals struck down an ordinance that prohibited persons from walking about the streets at night “without any visible or lawful business.” The Court held that the ordinance was unconstitutionally vague because it failed to “provide a reasonable degree of guidance to citizens, the police and the courts as to just what constitutes” a violation of the ordinance. *Id.* at 1100. The Court stated:

Fluid language which sweeps citizens under the penumbra of penal legislation without warning is abhorrent. The imposition of criminal liability for behavior which a person could not reasonably understand to be prohibited offends the most rudimentary considerations of fairness.

Id. at 1100-01.

This is precisely what has happened here. There is no way Mr. Gray could have known that the peaceful distribution of Bibles—a quintessential First Amendment activity— from the public bike path/sidewalk in front of Key Largo School would be considered a criminal act under §810.0975. As with the cases cited above, the “legitimate business” standard employed by the Statute simply does not provide sufficient notice of what conduct the statute forbids. Like the ordinance struck down in *Coates v. City of Cincinnati*, 402 U.S. 611, 616 (1971), F.S.A. §810.0975 is unconstitutionally vague because it “makes a crime out of what under the Constitution cannot be a crime.” Ordinary people simply could not have known that the Statute prohibited the peaceful distribution of religious literature from public rights of way. The police here did not even know, as one day the distribution was permitted and on another day it was not. *See Comp. ¶¶ 65-67; 91-116.*

Statutes affecting protected speech activities, such as F.S.A. § 810.0975,

must be carefully drawn or authoritatively construed to punish only unprotected speech and not be susceptible of application to protected expression. “Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity.”

Gooding v. Wilson, 405 U.S. 518, 522 (1972) (striking down statute which banned “opprobrious words or abusive language”) (quoting *NAACP v. Button*, 371 U.S. 415, 433 (1963)). The Statute at

issue here not only invites applications to protected expression, but has clearly been applied to prohibit Mr. Gray's protected speech.

2. The Statute grants unfettered discretion to government officials.

Closely related to the failure of §810.0975 to provide adequate notice is its vesting of unfettered discretion with the state as to its prosecution and with police officers as to its enforcement. In cases where infringement of constitutional rights are implicated through the enforcement of such a statute, as here, the vagueness doctrine “demands a greater degree of specificity than in other contexts.” *Smith v. Goguen*, 415 U.S. 566, 573 (1974). The exercise of constitutional liberties is subjected to unfettered discretion when a police officer is required to interpret and apply a standardless law. Here, pursuant to a law that requires those present to have “legitimate business,” the arresting officer had unfettered discretion to ban the Plaintiff's free speech activity in a traditional public forum. The discretion wielded in this case violates the dictates of the Supreme Court in *Papachristou*, in which it held:

Where . . . there are no standards governing the exercise of discretion granted by the ordinance, the scheme permits and encourages an arbitrary and discriminatory enforcement of the law.

405 U.S. at 170. Under §810.0975, and with no guidelines, a state official or police officer may arbitrarily prohibit any activity he or she deems not to be “legitimate,” and may likewise permit any activity that he or she deems to be “legitimate.” This is the very definition of unfettered discretion.

Innumerable activities with no connection to the School occur within the School's safety zone. Pedestrians walk, bike, and jog on the public bike path/sidewalk within 500 feet of the School; persons drive their cars on US 1 within 500 feet of the School; and people visit businesses, homes and churches located within 500 feet of the School, just to name a few. Exs. 14-25 (pictures and maps showing the homes, businesses, and other uses located within the school safety zone). Section 810.0975 is applicable to all these activities because its plain language applies to every entrance into a school safety zone, and the State obviously treats each and every one of these activities as “legitimate business.”³

Despite all these activities apparently constituting “legitimate business” within a school

³ By its terms the Statute only exempts “residents” and “persons engaged in the operation of a licensed business.” §810.0975(3). It therefore does not exempt those visiting or engaging in protected speech activities on public sidewalks abutting these locations.

safety zone, the State deems Plaintiff's Bible distribution illegitimate. The enforcement of §810.0975 against Plaintiff's speech is illustrative of the danger posed by unfettered discretion. The Statute permits the State to pick and choose between speakers, permitting those whose message it favors to speak within a school safety zone, and throwing those whose speech it disfavors in jail.

In addition to the use of the public streets and sidewalks, in practice, Key Largo School property is used by a wide array of community groups and individuals for a broad range of activities. The playground located on campus is viewed as a community playground, which is used on weekends and on weekdays, both while school is in session and after school. Exs. 4, 5. The property is used for picnics, community events, and recreational sports. *See* Exs. 2, ¶21; 4, 5 (listing various community uses of School property and the unfettered and unmonitored access to the property). Obviously, all of these people are entering the 500 foot zone without citation.

The Plaintiff simply could not have known that distributing Bibles from the public sidewalk in front of Key Largo School is "illegitimate" business, given all the other people found to have "legitimate business" within the zone. The determination of what constitutes "legitimate business" is left entirely to the unfettered discretion of the officials charged with enforcing the Statute, and no reasonable man (not even Defendants) could understand what the Statute proscribes.

C. THE STATUTE IS UNCONSTITUTIONALLY OVERBROAD.

Under the overbreadth doctrine, restrictions on speech cannot "sweep unnecessarily broadly and thereby invade the area of protected freedoms." *NAACP v. Alabama*, 377 U.S. 288, 307 (1964). *See also Schneider v. New Jersey*, 308 U.S. 147, 160 (1939). In the First Amendment area "government may regulate only with narrow specificity." *Button*, 371 U.S. at 433. A regulation is void if it "does not aim specifically at evils within the allowable area of [government] control but . . . sweeps within its ambit other activities that in ordinary circumstances constitute an exercise" of protected rights. *Thornhill v. Alabama*, 310 U.S. 88, 97 (1940).

F.S.A. §810.0975 requires persons to have "legitimate business" to enter or remain within a school safety zone. According to the plain language of the Statute, it applies to all speech and all conduct within a school safety zone. Undoubtedly, hundreds if not thousands of people go in and out of school safety zones between 1 hour prior to school beginning and 1 hour after school ends, whether driving in vehicles on streets, walking, biking, or jogging on a public bike path/sidewalk, visiting friends who live in the many homes located within school safety zones, patronizing the many

businesses located within school safety zones, or any other number of conceivable ways. Exs. 14-25 (pictures and maps showing the homes, businesses, and other uses located within the school safety zones around Key Largo School and Coral Shores High School). Obviously, the State is not arresting the innumerable people who enter or remain in a school safety zone by driving through it on a street, by walking, jogging, or biking through it via the public bike path, or by visiting businesses and residences located within such zones. Thus, all this conduct within a school safety zone is apparently deemed to be “legitimate business.”

Yet under the State’s interpretation of the Statute, all speech is not “legitimate business.” Indeed, if handing out free Bibles on a public sidewalk is proscribed by the Statute, then all other speech must be similarly proscribed, unless the State is taking the blatantly unconstitutional position that all other speech is permitted in a school safety zone, except religious speech. *Police Dep’t of Chicago v. Mosley*, 408 U.S. 92, 95-96 (1972), (“government may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored or more controversial views”). The State’s interpretation of §810.0975 turns the First Amendment on its head by treating non-expressive conduct better than constitutionally protected speech. Thus it is clear, under the facts of this case, that the “legitimate business” requirement violates the overbreadth doctrine because it sweeps so broadly that it proscribes all First Amendment activities within a school safety zone, while simultaneously permitting all non-expressive conduct.

Many courts, including the United States Supreme Court, have ruled that similar statutes were void under the overbreadth doctrine. In *Papachristou*, 405 U.S. at 158, the Court held unconstitutional a statute that prohibited “wandering or strolling around from place to place without any lawful purpose or object.” In addition to being unconstitutionally vague, the Court held that the statute was overbroad because it made “criminal activities which by modern standards are normally innocent,” and operated as “a trap for innocent acts.” *Id.* at 163-64. Similarly, in *Kirkwood*, 323 F. Supp. at 614-16, a federal district court held that a statute that prohibited persons from wandering “without any legitimate business or purpose” was “too vague and overbroad on its face to satisfy the constitutional requirements of Due Process.”

Under Supreme Court case law, F.S.A. §810.0975’s requirement that a person have “legitimate business” is impermissibly overbroad. It sweeps all protected expression into its prohibitions, and must be struck down.

D. F.S.A. §810.0975 IS A CONTENT-BASED RESTRICTION ON SPEECH THAT CANNOT SURVIVE STRICT SCRUTINY.

Because the public bike path/sidewalk where Mr. Gray was distributing Bibles is a traditional public forum, the State's ability to regulate speech in that forum is very limited. In fact, "[r]egulation of speech activity on governmental property that has been traditionally open to the public for expressive activity, such as public streets and parks, is examined under strict scrutiny." *United States v. Kokinda*, 497 U.S. 720, 726 (1990). Strict scrutiny is the most stringent form of analysis applied by the courts, and a regulation will only be upheld if it is "narrowly drawn to achieve a compelling interest." *Grace*, 461 U.S. at 177.

1. F.S.A. §810.0975 fails Strict Scrutiny.

Section §810.0975 is not "narrowly drawn to achieve a compelling interest." And as discussed below, §810.0975 cannot even satisfy the lesser standard for a reasonable time, place, and manner restriction, because the Statute was not applied in a content-neutral manner, it is not reasonable, it is not narrowly tailored to achieve a significant government interest, and it shuts down all alternative channels for communication.

a. The Statute is content-based.

Regulations that permit the government to discriminate on the basis of content cannot be tolerated under the First Amendment. *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 116 (1991). "Government regulation of expressive activity is content neutral so long as it is 'justified without reference to the content of the regulated speech'" *Ward*, 491 U.S. at 791 (quoting *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293 (1984)). The Supreme Court has instructed:

[A]bove all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content. . . . Necessarily, then, . . . government may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored or more controversial views. . . . [s]elective exclusions from a public forum may not be based on content alone, and may not be justified by reference to content alone.

Mosley, 408 U.S. at 95-96.

The Statute here is content-based for at least three reasons: by its terms it exempts "protests"; whether speech is deemed "legitimate" will obviously be decided based on the content of that speech; and the restriction was premised on listener reactions.

1. The Statute is content-based because it exempts “protests” from its restrictions.

Exempting protests from its reach, the Statute clearly prohibits speech based on content. The Statute states in relevant part that “Nothing in this section shall be construed to abridge or infringe upon the right of any person to peaceably assemble and protest.” §810.0975(2)(c). This section therefore would not apply if Mr. Gray was “protesting” the level of salaries paid to Florida teachers, or even protesting against the State’s restriction of non-protest speech in the zone.

The Supreme Court has made clear that a regulation is content-based “if the operative distinction is the message.” *Mosley*, 408 U.S. at 95. Here, it is abundantly clear that in order to determine whether speech is a “protest” and thereby exempt from the Statute’s reach, the message must be examined. Black’s Law Dictionary defines “protest” as “a formal statement or action expressing dissent or disapproval.” *Id.* at 1239 (7th Ed. 1999). Whether a speaker is expressing dissent or disapproval can only be determined by examining what is said. The Statute thus “ship(s) from the neutrality of time, place, and circumstance into a concern about content. This is never permitted.” *Mosley*, 408 U.S. at 99.

2. The Statute is content-based because the speech must be examined to determine whether it is “legitimate.”

The only way for the unnamed official to determine whether the speech taking place is legitimate is to examine its content. There are only two other possible alternatives, only one of which would save the constitutionality of the Statute. One alternative is that no speech would be considered “legitimate business.” This construction creates several of the constitutional violations briefed herein. Another construction could be that the State does not apply the Statute at all to any speech. While this may alleviate the many constitutional concerns, it cannot be the proper construction because the State is currently applying the Statute to the Plaintiff’s and to the other Gideons’ speech. The only remaining construction is that the unknown official determines which speech is legitimate and which speech is not. This determination can only be made by looking at the content of the speech.

3. The Statutes’ prohibition of Plaintiff’s speech was based on listener’s reactions.

A restriction is content-based if it is premised on the likes or dislikes of the audience. “Listeners’ reaction to speech is not a content-neutral basis for regulation.” *Forsyth County v.*

Nationalist Movement, 505 U.S. 123, 134 (1992) (emphasis added). A regulation that precludes or restricts speech based on the reaction of the audience is referred to as a “heckler’s veto.”

The Statute at issue here was applied to Mr. Gray based on reactions to his speech. The Plaintiff received approval for his Bible distribution activities from the Monroe County Sheriff’s Office, and the Key Largo School secretary acting on behalf of Principal Martinson. Comp. at ¶¶70-71, 78-80. Tellingly, not until she received “complaints” about the Plaintiff’s Bible distribution from other parents did Principal Martinson take action to restrict the peaceful distribution of Bibles. Ex. 12. This is a heckler’s veto and cannot be tolerated under the First Amendment.

Indeed, “it is firmly settled that under our Constitution the public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers, or simply because bystanders object to peaceful and orderly demonstrations.” *Bachellar v. Maryland*, 397 U.S. 564, 567 (1970) (internal citation omitted). Pursuant to this well-settled principle, the Supreme Court has routinely struck down regulations that operate as heckler’s vetoes. In *Coates*, 402 U.S. at 615-16, for instance, the Supreme Court held that a Cincinnati ordinance that made it a criminal offense for three or more people to assemble on the sidewalk and conduct themselves in such a manner as to annoy passers-by, was unconstitutional. The Court stated that “[o]ur decisions establish that mere public intolerance or animosity cannot be the basis for abridgement of these constitutional freedoms.” *Id.* at 615.

Similarly, in *Bachellar*, the Supreme Court examined the petitioners’ conviction under a Maryland public disturbance statute, which prohibited “acting in a disorderly manner.” 397 U.S. at 564. The Supreme Court noted that the signs held by the petitioners did not constitute fighting words and could not justify the petitioners’ convictions. *Id.* at 567. In dismissing the convictions, the Court held that the petitioners likely were found guilty of violating the statute “simply because they advocated unpopular ideas. Since conviction on this ground would violate the Constitution, it is our duty to set aside petitioners’ convictions.” *Id.* at 570. Section 810.0975 was enforced against the Plaintiff based on listener’s reaction his speech; the First Amendment knows no heckler’s veto.

b. The Statute is not narrowly tailored to further a compelling governmental interest.

The State will maintain that §810.0975 serves the interest of protecting school children from

drug dealers, gang members, or other harmful persons.⁴ Even assuming for sake of argument that this interest is compelling (and well-intentioned), Plaintiff asserts that the Statute on its face and as applied to his peaceful distribution of Bibles on the public bike path/sidewalk in front of Key Largo School is not narrowly tailored to serve this interest, or any other interest the State may offer.

“A statute is narrowly tailored if it targets and eliminates no more than the exact source of the ‘evil’ it seeks to remedy.” *Frisby v. Shultz*, 487 U.S. 474, 485 (1988). In other words, the State must show that “each activity within the prescription’s scope is an appropriately targeted evil.” *Id.*; *See also Watchtower Bible & Tract Soc’y v. Village of Stratton*, 536 U.S. 150, 168 (2002) (interest in preventing fraud did not support application of Ordinance to religious organizations, political campaigns, or to enlisting support for unpopular causes). Put in terms of the present case, the State must show that applying §810.0975 to prohibit the Plaintiff from distributing Bibles on the public bike path/sidewalk in front of Key Largo School is narrowly tailored to serve any alleged interests.

The Statute is not narrowly tailored as applied to Mr. Gray because it prohibits his speech even though it is not part of the conduct the State seeks to prohibit via §810.0975. Mr. Gray is not the type of person at which the Statute aims. Indeed, he is a long-time resident of Key Largo, he works there, and he even notified both the Sheriff’s office and the School prior to beginning his distribution. (Comp. ¶¶ 12, 24, 70-71, 78-80). F.S.A. §810.0975’s purposes are not served when it is applied to those who are upstanding members of the community, and who contacted the Sheriff’s office and School beforehand.

Ill-defined laws, like the Statute at issue here, that permit government officials to punish people for peacefully exercising fundamental freedoms run afoul of the First Amendment. As the Supreme Court has held, “Broad prophylactic rules in the area of free expression are suspect. Precision of regulation must be the touchstone in an area so closely touching our most precious freedoms.” *Button*, 371 U.S. at 438. The State’s application of §810.0975 to the Plaintiff is clearly not narrowly tailored to further the interest the Statute was adopted to serve.

The Supreme Court found the same flaw in the law at issue in *Grace supra*. The *Grace* Court struck down a ban on the display of any “flag, banner, or device” on the Supreme Court grounds and surrounding public sidewalks because it did not substantially serve the purposes asserted by the government. *Id.* at 183-84. The purpose of the Act was to “provide for the protection

⁴ *See e.g., J.L.S. v. State*, 947 So. 2d 641, 647 (Fla. 3d DCA 2007).

of the building and grounds and the persons and property therein, as well as the maintenance of proper order and decorum.” *Id.* at 182. The *Grace* Court noted that there was no suggestion that “appellees’ activities in any way obstructed the sidewalks or access to the Building, threatened injury to any person or property, or in any way interfered with the orderly administration of the building or other parts of the grounds.” *Id.* The Court held that the statute had an “insufficient nexus with any of the public interests that may be thought to undergird [the statute].” *Id.* at 181.

Similarly, in this case, the application of §810.0975 to Plaintiff’s speech has an “insufficient nexus with any of the public interests” the Statute was enacted to further. *Id.* There is no nexus whatsoever. The State’s interest in protecting children is laudable, but that interest is not served in any way by prohibiting the Gideons from handing out free Bibles on a public sidewalk in front of the School. As the Supreme Court recognized in *Grayned*,

[W]e think it clear that the public sidewalk adjacent to school grounds may not be declared off limits for expressive activity by members of the public. . . .

....

Without interfering with normal school activities, daytime picketing and handbilling on public grounds near a school can effectively publicize [a person’s views] to pedestrians, school visitors, and deliverymen, as well as to teachers, administrators, and students.

408 U.S. at 118-19. Incredibly, here the State treats religious speech as not being “legitimate business” under §810.0975. And if religious speech is not legitimate, then neither is any other speech. That being so, the State has created a “speech-free zone” around schools, something the Supreme Court clearly will not tolerate.

c. The Statute is not narrowly tailored because it is both overinclusive and underinclusive in light of the State’s interests.

An additional reason why the Statute fails strict scrutiny facially is that it is both underinclusive and overinclusive in relation to the interests it seeks to further. A law is underinclusive when it fails to prohibit activities that result in the problem the law was purportedly adopted to address. For instance, in *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993), the city adopted an ordinance to prevent cruelty to animals. *Id.* However, the ordinance contained an exemption for “any person, group, or organization” that slaughtered a small number of animals for the purpose of sale. *Id.* The Court held that the ordinance was unconstitutional because the city could not explain why “commercial operations that slaughter ‘small

numbers' of hogs and cattle do not implicate its professed desire to prevent cruelty to animals.” *Id.* The ordinance was underinclusive, and thus lacked the requisite narrow tailoring, because it permitted persons and organizations to engage in the very activities it was adopted to prohibit. *Id.* at 578 (“[T]he fact that allegedly harmful conduct falls outside the statute’s scope belies a governmental assertion that it has genuinely pursued an interest ‘of the highest order’”) (Blackmun, J., concurring).

The same is true here. Like the ordinance in *Lukumi*, §810.0975 is subject to several exemptions that renders it underinclusive. First, it does not apply to “legitimate business” (however that is defined). Those engaged in whatever the unknown official may deem legitimate business may do or say whatever they wish within the zone, even engage in those activities that are the supposed aim of the Statute. Second, it does not apply to those engaging in “protest.” As long as people are engaging in protest, they are free to enter and remain in the zone, and engage in those same activities. Moreover, §810.0975(3) states: “This section does not apply to residents or persons engaged in the operation of a licensed commercial business within the school safety zone.” This exemption also permits any activity to occur within a school safety zone, even those activities that are the aim of the Statute, so long as they take place in conjunction with a resident or commercial business operator. The Statute is obviously underinclusive.

A law also fails the narrow tailoring requirement of strict scrutiny if it is overinclusive. A law is overinclusive if its “broad scope . . . is unnecessary to serve the interest” it was adopted to further. *Lukumi*, 508 U.S. at 578 (Blackman, J, concurring). Significantly, the Fifth Circuit Court of Appeals recently struck down a school safety ordinance similar to the one at issue here because it was overinclusive and thus not narrowly tailored. *Knowles v. City of Waco*, 462 F.3d 430 (5th Cir. 2006). The ordinance in *Knowles* prohibited “street activities and parades” and applied only when school speed zone limits were in effect or when warning lights were flashing. *Id.* at 432. The ordinance was adopted to “prohibit activities that could ‘distract’ drivers during the times that school zones are active.” *Id.* at 434. The constitutional flaw of the ordinance was that its terms were so broad that it “potentially criminalize[d] . . . a broad range of expressive and legitimate conduct” and thus was “hardly tailored at all, much less narrowly tailored to prevent distraction of motorists when school zone rules are in effect.” *Id.* at 435. As the Court observed, the law could be “violated by the core constitutional acts of peaceful expressive activity or peaceable assembly alone.” *Id.* This

is precisely what has happened here. The Plaintiff's peaceful expressive activities have been swept into the prohibition of §810.0975.

Similarly, in *Lukumi*, the Supreme Court held an ordinance impermissibly overinclusive because it prohibited constitutionally protected activities where those activities “did not threaten the city’s interests.” *Id.* at 538-39. This same vice exists in the Statute at issue here. §810.0975’s broad scope prohibits peaceful, constitutionally protected speech activities (like Plaintiff’s Bible distribution) when those activities pose none of the threats the Statute was enacted to curtail. Worse, under the State’s interpretation of the Statute, all speech within a school safety zone is prohibited, while all conduct is permitted (like jogging, biking, walking, driving, operating a business, etc) and, because of the exemption in §810.0975(3), even some of the very conduct that the Statute was passed to curtail is permissible within a school safety zone so long as it takes place in connection with a resident or commercial business operator. The Statute is underinclusive and overinclusive, and for this reason too fails the narrow tailoring requirement of strict scrutiny.

2. The Statute cannot even satisfy the valid time, place, and manner test.

F.S.A. §810.0975 not only fails the strict scrutiny test, but also fails as a valid time, place, and manner restriction. A restriction on speech in a traditional public forum is constitutional only if it is (1) content neutral, (2) narrowly tailored to serve a significant governmental interest, and (3) allows for ample alternative channels for the expression. *Ward*, 491 U.S. at 791.

a. The Statute is not content neutral as applied to the Plaintiff.

As discussed above in the context of strict scrutiny, §810.0975 is not content neutral.

b. The Statute is not narrowly tailored to serve a significant governmental interest.

As explained above, §810.0975 lacks the requisite fit between means and ends to satisfy the First Amendment. The State may only suppress protected speech in a public forum only when there is a “clear and present danger of riot, disorder, interference with traffic upon the public streets, or other immediate threat to public safety, peace or order.” *Cantwell v. Connecticut*, 310 U.S. 296, 308 (1940). Mr. Gray’s speech did not result in a clear and present danger of any of this occurring.

c. The Statute does not allow for ample alternative channels for expression--it allows for none.

Prohibiting Mr. Gray from distributing literature within 500 feet of School property,

including on the public sidewalk, does not leave open ample alternative channels for communication of his protected speech. This is simply due to the fact that no speech in any form is permitted under the Statute. The requirement that “alternative channels of communication” exist is not satisfied by the availability of other areas to exercise his constitutional rights: “It goes without saying that “one is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place.”” *Grayned*, 408 U.S. at 119 n.40 (emphasis added).

Here, the Plaintiff is compelled by his religious beliefs to distribute Bibles to public school students and their parents from the public bike path/sidewalk adjacent to public schools. Comp. ¶¶25-27, 33-35, 182-187. The Statute leaves open no alternative channels—much less ample ones—because it prohibits ALL speech within the zone. It allows no manner of speech. The Plaintiff’s desired expression—distributing Bibles to public school students from the public bike path/sidewalk in front of those schools—is entirely foreclosed by the Statute, and there are no other practical alternatives by which they may communicate his message. This lack of ample alternative channels is yet another unconstitutional aspect of the Statute.

CONCLUSION

Plaintiff prays that Defendants be enjoined from enforcing §F.S.A. 810.0975 facially and as-applied against Plaintiff’s religious speech. Plaintiff requests that any bond be waived.

Respectfully submitted,

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Certificate of Service

I hereby certify that on the 10th day of May, 2007, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF. I also certify that the foregoing document is being served this day on all counsel of record or pro se parties identified on the attached service list in the manner specified, either via transmission of Notice of Electronic Filing generated by CM/ECF or in some other authorized manner for those counsel or parties who are not authorized to receive electronically Notices of Electronic Filing.

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SERVICE LIST

**THOMAS GRAY v. MARK E. KOHL, in his official capacity as State Attorney, et al.
Case No.: 07-10024-CIV-MOORE**

**All named persons are being served via ECF or UPS delivery this the 10th day of May,
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